

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 27, 2021

Before

DIANE S. SYKES, Chief Judge

DAVID F. HAMILTON, Circuit Judge

AMY J. ST. EVE, Circuit Judge

No. 20-2750

ANTONIO MAYS,
Plaintiff-Appellant,

v.

TRACY JOHNSON,
Defendant-Appellee

Appeal from the United States District
Court for the Eastern District of
Wisconsin.

No. 18-CV-1769

William E. Duffin,
Magistrate Judge

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc, no judge in regular active service has requested a vote on the motion for rehearing en banc¹ and the judges on the original panel have voted to deny rehearing. It is, therefore, **ORDERED** that the petition for rehearing and petition for rehearing en banc is **DENIED**.

¹ Circuit Judge Candace Jackson-Akiwumi did not participate in the consideration of this petition for rehearing en banc.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 18, 2021*
Decided June 25, 2021

Before

DIANE S. SYKES, *Chief Judge*

DAVID F. HAMILTON, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 20-2750

ANTONIO MAYS,
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Appeal from the United States District
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William E. Duffin,
Magistrate Judge.

ORDER

After his probation and parole agent sought to revoke his extended supervision and have him taken into custody, Antonio Mays sued her under 42 U.S.C. § 1983 for lacking any legitimate reason to take such steps. The district court concluded that the officer was entitled to absolute immunity and entered summary judgment in her favor. We affirm.

* We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. *See* FED. R. APP. P. 34(a)(2)(C).

In March 2018, while on community supervision (following a prison term for armed robbery), Mays was implicated in a double homicide. His probation and parole agent, Tracy Johnson, initiated proceedings to revoke his supervision and then had him detained on a “revocation hold.” She alleged four violations of his release conditions—two related to the homicides, one for possessing a gun, and one for lying to police. After a hearing, an administrative law judge with the State of Wisconsin Division of Hearings and Appeals declined to revoke Mays’s supervision. The ALJ found the evidence sufficient to prove only that Mays had lied to the police—a violation that did not on its own justify revocation. That decision was upheld on appeal.

Although Mays’s revocation hold was lifted in late July, he remained in custody another two months while criminal charges related to the double homicide were pending. When he posted bail and was released, a different probation and parole agent was temporarily assigned to supervise him in the community.

Meanwhile, Johnson had received lab results showing that Mays’s DNA was found on two firearms linked to the homicides. Based on this new evidence, Johnson moved successfully to reopen revocation proceedings. On October 8, Johnson issued a warrant (an “apprehension request” under Wisconsin’s terminology) for Mays’s arrest, and he was taken back into custody. Eleven days later, Mays was convicted by a jury in the double homicide trial. Johnson withdrew the revocation petition and filed a new one based on the convictions. After a second hearing, Mays’s supervision was eventually revoked, and he received a 10-year sentence with credit for the 11 days served after returning to custody.

Mays brought this suit against Johnson, asserting that she subjected him to additional incarceration without justification—in violation of the Eighth Amendment—when she had him arrested based on the charges he had “beaten” in the first revocation hearing. Because Johnson did not allege any new violations since his first revocation hearing, Mays argued that she lacked a legitimate basis to revoke his supervision and have him arrested. In Mays’s view, Johnson’s persistence in pursuing revocation, even after a new probation and parole agent had taken over his day-to-day supervision, amounted to harassment and exposed the illegitimacy of her actions. He sought money damages for the 11 days spent in custody before his conviction.

The district court entered summary judgment for Johnson on immunity grounds. The court concluded that Johnson, in recommending the revocation of Mays’s

supervision and his incarceration, was performing a “quasi-judicial function” and therefore protected by absolute immunity.

On appeal, Mays maintains that Johnson effectively lost any immunity after another agent was assigned to oversee his day-to-day supervision. He also continues to assert that she caused him to be arrested for violations that she knew he previously had “won on.”

We apply a “functional approach” to decide whether the actions of a government official warrant absolute immunity, looking to “the nature of the function performed, not the identity of the actor who performed it.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (internal citation omitted); *Jones v. Cummings*, No. 20-1898, 2021 WL 2134298, at *4 (7th Cir. May 26, 2021). Absolute immunity shields, for example, a prosecutor’s conduct as an advocate that is “intimately associated with the judicial phase of the criminal process,” such as initiating a prosecution and presenting the state’s case. *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976). But absolute immunity does not extend to a parole officer who investigates a charge and then prepares a violation report for a revocation; such conduct lacks a “prosecutorial or judicial analog.” *Wilson v. Kelkhoff*, 86 F.3d 1438, 1446 (7th Cir. 1996); see also *Dawson v. Newman*, 419 F.3d 656, 662 (7th Cir. 2005) (declining to extend absolute immunity to parole officers for performing their day-to-day duties in the supervision of a parolee).

With regard to Johnson’s actions to initiate revocation proceedings, she is entitled to absolute immunity. Her acts are closely associated with the quasi-judicial phase of the criminal process. See *Tobey v. Chibucos*, 890 F.3d 634, 650 (7th Cir. 2018) (probation officer engaged in quasi-judicial function by filing memoranda requesting that state’s attorney begin proceedings to revoke probation). Under the applicable Wisconsin regulations, see WIS. ADMIN. CODE DOC § 331.03(2), parole agents have the discretion to decide how they will proceed after investigating an alleged parole violation; they might recommend revocation, resolve the matter in an informal counseling session, or come up with another solution altogether. The record reflects that Johnson exercised that discretion when she sought revocation of Mays’s supervision based on the lab’s DNA results. “[F]iling requests for revocation are not violations of section 1983; they are [part of] the job description for the often thankless job of probation officer.” *Tobey*, 890 F.3d at 650.

Johnson is likewise entitled to absolute immunity for her decision to issue an apprehension request to have Mays taken into custody. Parole officers are absolutely

immune, we have reiterated, for the quasi-judicial activity of signing an arrest warrant, provided they were not involved in preparing the evidence that formed the basis of the warrant. *See id.* at 650; *Dawson*, 419 F.3d at 662; *Copus v. City of Edgerton*, 151 F.3d 646, 649 (7th Cir. 1998); *Walrath v. United States*, 35 F.3d 277, 282 (7th Cir. 1994). As we have explained, a parole officer's issuing of an arrest warrant for a parole violation has judicial characteristics: "[I]t involves the exercise of discretion in applying the law to the facts of a particular case, poses a heightened risk of vexatious litigation, and is 'open to correction through ordinary mechanisms of review.'" *Walrath*, 35 F.3d at 282. *Contra Washington v. Rivera*, 939 F.3d 1239, 1243–44 (11th Cir. 2019) (collecting cases and holding that parole officers' decisions to issue warrants were entitled to only qualified immunity). Johnson's act of signing the apprehension request was an exercise of discretion based on the DNA report she obtained from the lab, and as such is shielded by absolute immunity.

Lastly, to the extent Mays believes that Johnson initiated revocation proceedings and arranged his arrest to harass him, her motives are irrelevant if—as we have concluded—she is entitled to absolute immunity. *See Tobey*, 890 F.3d at 649. But, regardless we note that even if Johnson were not entitled to immunity, Mays's claims would fail on the merits. He has no basis for a § 1983 claim for the 11 days he spent in custody before his conviction because that time was credited to a lawful sentence. *See Ewell v. Toney*, 853 F.3d 911, 917 (7th Cir. 2017).

AFFIRMED

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

ANTONIO DARNELL MAYS,

Plaintiff,

v.

Case No. 18-CV-1769

TRACY JOHNSON,

Defendant.

ORDER

Pro se plaintiff Antonio Mays filed this lawsuit under 42 U.S.C. § 1983. United States District Judge Pamela Pepper screened the amended complaint and allowed Mays to proceed with a claim that defendant Tracy Johnson revoked his extended supervision twice based on the same rule violations. The parties subsequently consented to the jurisdiction of a magistrate judge. The parties have filed cross-motions for summary judgment which have been fully briefed and are ready for resolution.

Undisputed Facts

The relevant facts are undisputed. (*See* ECF Nos. 26, 31, 33.) Mays is a Wisconsin state prisoner who has been in and out of custody. (ECF No. 26, ¶¶ 1, 3.) In 2003 Mays was convicted of armed robbery with use of force and sentenced to an initial term of ten years in prison, to be followed by ten years of extended supervision. (ECF No. 31, ¶ 4.) On January 3, 2012, Mays was released to community supervision.

(*Id.*, ¶ 5.) Johnson was Mays's probation and parole agent between July 2013 and September 2018. (ECF No. 31, ¶¶ 1-3; ECF No. 26, ¶ 5.)

As a condition of his release Mays signed Rules of Supervision in which he agreed to "[a]void all conduct which is in violation of federal or state statute, municipal or county ordinances, tribal law or which is not in the best interest of the public welfare or [his] rehabilitation. (ECF No. 31, ¶ 6.) Mays also agreed to "[p]rovide true, accurate, and complete information in response to inquiries by DOC staff"; "[i]nform [his] agent of [his] whereabouts and activities as he/she directs"; and not possess, own, or carry a firearm without his agent's permission. (*Id.*, ¶ 7.)

On or around March 15, 2018, there was a double homicide at a house in Milwaukee. (ECF No. 31, ¶¶ 8-9.) Witnesses at the scene reported that Brandon Jones (Mays's cousin) was playing dice at the house when a heavy-set black man wearing a jean jacket forced his way into the house and began shooting. (*Id.*, ¶¶ 10-13.) Someone at the house shot back and wounded the shooter. (*Id.*, ¶ 14.) Investigators collected evidence at the crime scene, including DNA samples, three casings from a .45 caliber firearm, and one casing from a 9mm firearm. (*Id.*, ¶ 11.)

Police officers talked to Jones following the shooting. (ECF No. 31, ¶¶ 15-16.) Jones said that he had called Mays to the house after losing money in a dice game. (*Id.*, ¶ 15.) Jones saw Mays enter the house. (*Id.*) Gunshots rang out. (*Id.*) Jones then saw Mays running away from the house with two guns and gunshot wounds. (*Id.*) Jones told officers that he drove Mays to the hospital and Mays disposed of the weapons on the way there. (*Id.*, ¶ 16.)

Mays was admitted to a hospital in Milwaukee with gunshot wounds to his head and back. (ECF No. 31, ¶ 8.) Mays matched the description of the shooter and police officers found a jean jacket in his hospital room. (*Id.*, ¶ 10.) Mays denied any involvement in the housing shooting. (*Id.*, ¶ 17.) He told police officers that he was a victim of an attempted robbery at a nearby gas station. (*Id.*) Officers found no evidence of a shooting at a gas station that day. (*Id.*, ¶ 18.)

Later on March 15, 2018, Johnson received a phone call from the Milwaukee County Police Department notifying her that Mays had been admitted to the hospital with gunshot wounds. (ECF No. 32, ¶ 11.) She interviewed Mays and asked him to provide a written statement. (*Id.*, ¶ 19.) Mays admitted that he was at the location of the shooting with Jones. (*Id.*, ¶ 20.) He said that he initially told police he was not involved in the incident because he didn't want Johnson to find out he was engaging in negative behavior. (*Id.*, ¶ 21.) Mays explained that he was sitting in a car outside of the house waiting for Jones. (*Id.*, ¶ 22.) Mays got tired of waiting and went inside to get Jones. (*Id.*) As Mays and Jones were walking out of the house together, Mays was shot. (*Id.*) Mays denied having (or shooting) a firearm. (*Id.*, ¶ 23.)

Several days later, on March 26, 2018, the police executed a search warrant at Mays's prior residence. (ECF No. 31, ¶ 24.) They recovered seven firearms, including a .45 caliber firearm and a 9mm firearm. (*Id.*, ¶ 25.) Testing showed that the casings found at the crime scene matched the firearms found in the residence. (*Id.*, ¶ 26.)

Based on this evidence, Johnson decided to initiate revocation proceedings. (ECF No. 31, ¶¶ 27, 30.) She identified four Rules of Supervision that Mays violated

and took Mays into custody on a “revocation hold.” (*Id.*) Two days later, on March 28, 2018, the Milwaukee County District Attorney charged Mays criminally with two counts of first-degree reckless homicide and two counts of felon in possession of a firearm. (*Id.*, ¶¶ 28-29.) The criminal charges were amended later to felony murder and first-degree reckless homicide and two counts of felon in possession of a firearm. (*Id.*, ¶ 29.)

On June 11, 2018, the Division of Hearings and Appeals held a hearing on the revocation request. (ECF No. 31, ¶ 31.) Following the hearing, an administrative law judge (ALJ) concluded that the Department of Corrections proved rule violation number three (providing a false statement to police) but could not prove rule violation numbers one, two, and four (having and shooting a firearm at the crime scene). (*Id.*, ¶ 32.) The ALJ denied the request to revoke Mays’s extended supervision because providing a false statement to police did not alone warrant revocation. (*Id.*)

Johnson appealed the decision, which was sustained on July 27, 2018. (ECF No. 31, ¶¶ 33-34.) Johnson then cancelled the “revocation hold” effective July 31, 2018. (*Id.*, ¶ 35.) Mays nevertheless remained in custody because he still had criminal charges pending against him for the double homicide. (*Id.*, ¶ 36.)

On August 16, 2019, Johnson received DNA results from the State Crime Lab tying Mays to the double homicide. (ECF No. 31, ¶ 38.) DNA found on two of the weapons used in the double homicide matched Mays’s profile. (*Id.*) Based on this new evidence, Johnson filed a motion to reopen Mays’s revocation proceeding on August 29, 2018. (*Id.*, ¶ 39.) While the motion to reopen was pending, Mays posted bail on

the double homicide charges and was released from custody on September 19, 2018. (*Id.*, ¶37.) Mays then “temporarily” received a new probation and parole agent, Bryan Balde. (ECF No. 33, ¶ 5.)

On October 3, 2018, the Division of Hearings and Appeals granted Johnson’s motion to reopen Mays’s revocation proceeding. (ECF No. 31, ¶ 40.) The case went back to the original ALJ for further proceedings. (*Id.*) Johnson and her superiors decided to take Mays back into custody pending the new revocation proceeding. (*Id.*, ¶ 41.) Mays was returned to custody on October 8, 2018. (*Id.*, ¶ 42.) About 11 days later, on October 19, 2018, a jury convicted Mays of all counts in his criminal case. (*Id.*, ¶ 44.) Johnson then requested to withdraw the motion to reopen revocation proceedings based on the DNA evidence in order to initiate a new revocation proceeding based on the jury conviction. (*Id.*, ¶ 46.) The Division granted the request. (*Id.*, ¶ 48.)

On October 29, 2018, Johnson filed a new revocation proceeding identifying the same four rule violations but now with the homicide conviction. (ECF No. 31, ¶¶ 50-52.) An ALJ found that Mays violated rules one, two, and four. (*Id.*, ¶ 54.) The ALJ dismissed rule violation three because it had been fully litigated in the original revocation proceeding. (*Id.*)

The ALJ revoked Mays’s extended supervision and remanded him to state prison for 10 years and 5 days with custody credit for the time he spent in jail during the revocation proceedings. (ECF No. 31, ¶ 55.) Mays appealed the decision, challenging only the length of confinement. (*Id.* ¶ 56.) The Administrator affirmed on

February 5, 2019. (*Id.*, ¶ 57.) The Administrator signed a Revocation Order and Warrant remanding Mays to state prison, giving Mays full credit for the time spent in jail from the date of his re-arrest on October 8, 2018, until his arrival in prison on February 13, 2019. (*Id.*, ¶¶ 58-61.)

Summary Judgment Standard

Summary judgment is required where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665, 668 (7th Cir. 2011). When considering a motion for summary judgment, the court takes evidence in the light most favorable to the non-moving party and must grant the motion if no reasonable juror could find for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986).

Analysis

Mays seeks monetary damages for the 11 days he served in jail prior to his criminal conviction in the double homicide (between October 8, 2018 and October 19, 2018). Mays says he was “out on bail” for the double homicide and Johnson should have allowed him to remain out of custody until his criminal trial. Instead, Johnson took Mays back into custody on October 8, 2018, following the Division’s decision to grant her motion to reopen his revocation proceeding.

“Probation and parole officials are entitled to absolute immunity ‘for their activities that are analogous to those performed by judges.’” *Tobey v. Chibucos*, 890

F.3d 634, 650 (7th Cir. 2018) (quoting *Dawson v. Newman*, 419 F.3d 656, 662 (7th Cir. 2005)); see also *Smith v. Gomez*, 550 F.3d 613, 619 (7th Cir. 2008). While quasi-judicial immunity does not extend to the day-to-day duties in the supervision of a parolee or investigating and gathering evidence for revocation, parole officials are immune from any federal claims for “acts associated with the decision to grant, revoke, or deny parole.” *Dawson*, 419 F.3d at 662. The Court of Appeals for the Seventh Circuit has extended that immunity “to those activities that are part and parcel of the decision process” to deny, grant, or revoke parole. *Thompson v. Duke*, 882 F.2d 1180, 1183 n.3 (7th Cir. 1989).

While Johnson was involved in supervising and investigating Mays’s extended supervision violations, Mays’s complaint with Johnson stems from her decision to recommend revoking his extended supervision and incarcerating him. In conducting the latter two tasks, Johnson was engaged in a quasi-judicial function for which she is protected by absolute immunity. See e.g. *Weso v. Thomson*, No. 19-C-404, 2020 WL 3509612, at *3 (E.D. Wis. June 29, 2020) (dismissing a claim at summary judgment based on absolute immunity because the defendant “did not simply investigate [the plaintiff’s] offending conduct and submit report on his findings; he recommended that [the plaintiff’s] extended supervision be revoked and that he be incarcerated”); see also *Griffin v. Laurie Bondar, Cathy Coulson, Denise Tuttle*, No. 20-CV-380-JPS, 2020 WL 3546814, at *3 (E.D. Wis. June 30, 2020) (dismissing a claim at screening because two parole agents’ decision to recommend revoking extended supervision was “sufficiently adjudicative in nature” to be protected by prosecutorial immunity.).

Accordingly, the court will grant the defendant's motion for summary judgment, deny Mays's motion for summary judgment, and dismiss this case. *See* 28 U.S.C. 1915(e)(2)(B)(iii) ("Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that...the action...seeks monetary relief against a defendant who is immune from such relief.")

IT IS THEREFORE ORDERED that Mays's motion for summary judgment (ECF No. 23) is **DENIED**; the defendant's motion for summary judgment (ECF No. 29) is **GRANTED** and this case is **DISMISSED**. The Clerk of Court will enter judgment accordingly.

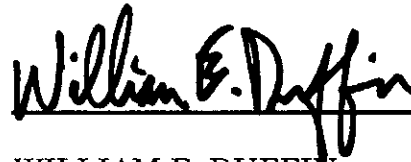
This order and the judgment to follow are final. A dissatisfied party may appeal this court's decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within **30 days** of the entry of judgment. *See* Federal Rule of Appellate Procedure 3, 4. This court may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30-day deadline. *See* Federal Rule of Appellate Procedure 4(a)(5)(A).

Under certain circumstances a party may ask this court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Federal Rule of Civil Procedure 59(e) must be filed within **28 days** of the entry of judgment. The court cannot extend this deadline. *See* Federal Rule of Civil Procedure 6(b)(2). Any motion under Federal Rule of Civil Procedure 60(b) must be filed within a reasonable time,

generally no more than one year after the entry of the judgment. The court cannot extend this deadline. *See* Federal Rule of Civil Procedure 6(b)(2).

A party is expected to closely review all applicable rules and determine, what, if any, further action is appropriate in a case.

Dated at Milwaukee, Wisconsin this 20th day of August, 2020.

A handwritten signature in black ink, reading "William E. Duffin", written over a horizontal line.

WILLIAM E. DUFFIN
U.S. Magistrate Judge

**Additional material
from this filing is
available in the
Clerk's Office.**